

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KYRIN M.,

Claimant,

OAH No.: 2011110708

and

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

Jennifer M. Russell, Administrative Law Judge with the Office of Administrative Hearings, heard this matter in Los Angeles on May 7, 2012.

Sonjia D. White, Resource Attorney, and Jane Newman, Head Deputy, Collaborative and Restorative Justice Services, both of the Los Angeles County Office of the Public Defender, represented claimant Kyrin M.¹

Johanna Arias-Bhatia, Fair Hearing/Government Affairs Manager, represented South Central Los Angeles Regional Center (SCLARC or service agency).

Testimonial and documentary evidence was received, the case argued, and the matter was submitted for decision on June 1, 2012.² The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

¹ Initials are used to preserve claimant's privacy.

² The record remained open until June 1, 2012 for submission of closing briefs. Claimant's Closing Brief, submitted May 25, 2012, has been marked for identification only as Exhibit C8. The service agency's Closing Argument, submitted May 25, 2012 (by facsimile) and June 4, 2012 (by mail), has been marked for identification only as Exhibit 11. Claimant's Rebuttal Brief, submitted June 1, 2012, has been marked for identification only as Exhibit C9.

ISSUE

Whether, pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act),³ claimant is eligible for services and supports under the “fifth category” of eligibility, defined as a disabling condition “closely related to mental retardation” or requiring “treatment similar to that required for individuals with mental retardation.”

FACTUAL FINDINGS

1a. Claimant was born February 9, 1994. No post-natal complications were reported. He commenced walking at age nine months. He reportedly understood language “early” and he combined words into short sentences by age 12 months, at which time he was also toilet-trained. Claimant has not suffered any serious illness or injuries.

1b. On October 8, 2010, claimant was arrested for a weapon-related offense, the facts of which were not established at the hearing. Claimant was detained at Los Padrinos Juvenile Hall until his June 3, 2011 release. Claimant resides with his mother and siblings. Claimant claims eligibility for services under the Lanterman Act.

2. By letter dated October 21, 2011, SCLARC notified claimant that it concluded an assessment process to determine his eligibility for Lanterman Act services. In part the letter states the following:

The team carefully considered [claimant’s] . . . psychological assessment completed by Dr. Gabrielle du Verglas, PhD, on 6/24/11 and a psycho-social assessment complete by Mr. John Amador, MSW, on 5/20/11. In addition, the team reviewed school records from Los Angeles County Office of Education.

The interdisciplinary team found that [claimant] . . . does not meet the definition of a developmental disability . . . for the following reasons: [claimant] . . . is diagnosed with Attention Deficit Hyperactivity Disorder (by history) and Borderline Intellectual Functioning. He does not have mental retardation. He does not have seizures so he does not have epilepsy. His motor skills show no evidence of cerebral palsy and he was not diagnosed with having autism.

The interdisciplinary team determined that [claimant] . . . does not have a substantial disability found to be closely related to mental retardation or to

³ Welfare and Institutions Code section 4500 et seq. All statutory citations are to the Welfare and Institutions Code unless otherwise specified.

require treatment similar to that required for individuals with mental retardation. [claimant] . . . is therefore ineligible for SCLARC services.

3. On November 14, 2011, claimant filed a timely Fair Hearing Request appealing the service agency's ineligibility determination. Thereafter, these proceedings ensued.

Educational Evaluations

4. Los Angeles Unified School District (LAUSD) is claimant's district of residence. Claimant has an initial Individualized Education Plan (IEP) date of September 7, 2004. In November 2010, while claimant participated in a highly structured, small special day class at Juvenile Court School, the Los Angeles County Office of Education (LACO) conducted a psycho-educational assessment of claimant,⁴ which included administration of the Woodcock-Johnson III Normative Update Tests of Achievement (Form A),⁵ in connection with a full triennial IEP that occurred on December 1, 2010.⁶ In addition, on April 25, 28 and May 12, 2011, claimant underwent a speech and language assessment.⁷ After claimant returned to his LAUSD school of residence, on March 1, 2012, an annual IEP meeting occurred.⁸ These assessments and evaluations collectively establish the following:

a. Claimant was found eligible for special education services while he was enrolled in the second grade. He continues to receive special education services under the category of "specific learning disability." Claimant is enrolled in a special day class and he receives 30 minutes per week of counseling services.

b. Claimant manifests significant weaknesses in reading, writing, and arithmetic that affect his access to the general curriculum. For example, in reading claimant has difficulty with decoding, fluency, and comprehension. He exhibits weakness in spelling, but he is able to write simple sentences. He is capable of doing basic addition, subtraction, multiplication, and division. Claimant has difficulties with advanced mathematical concepts involving integers, fractions, and word problems.

c. Claimant displays age-appropriate communication skills in area of phonology (articulation), voice, and fluency. However, his core receptive and expressive vocabulary is below age and grade expectations. His comprehension of and use of complex sentence

⁴ See Claimant Exhibit 5.

⁵ See Claimant Exhibit 6.

⁶ See Claimant Exhibit 4.

⁷ See Service Agency Exhibit 6.

⁸ See Claimant Exhibit 3.

structures is limited. Consequently, concrete language is most effective when communicating with claimant.

d. Claimant's Woodcock-Johnson III sub-test scores indicate academic achievement at varying grade levels as low as 1.7, but no higher than 5.1. Claimant's score for broad reading (55), broad math (68), and broad written language (52) all suggest performance in the deficient range.

e. Claimant's full scale score of 71 on the Cognitive Assessment System (CAS), a measurement of cognitive functions such as planning, attention, and simultaneous processing, is reported to be within the low classification range and is ranked at the third percentile. There is significant variation among the scales constituting claimant's full scale score: Planning (77), Simultaneous (64), Attention (77), and Successive (100).

f. Assessment of claimant's ability to comprehend auditory information indicates scores in the low average range with a weakness in auditory cohesion. Claimant's visual processing skills scores, which are reported to be in the deficient range, indicate that he has a visual processing problem.⁹

5. Several LAUSD teachers noted claimant's physical and verbal aggression, disrespect for adult authority, and poor academic progress resulting from anti-social classroom behavior and chronic absenteeism in his LAUSD Elementary School Cumulative Record.¹⁰

6. Claimant reportedly attributed his past academic performance to not caring about school and seeing no value in doing well.¹¹ He has expressed an interest in full-time work with the Department of Motor Vehicles.¹²

Psychological Evaluations (conducted in connection with competency determination)

7. Timothy D. Collister, Ph.D., a clinical psychologist retained in connection with the defense of claimant regarding the weapon charges set forth above, conducted a February 22, 2011 competency evaluation of claimant and prepared a psychological evaluation report¹³ in which claimant's early traumatic exposures to violence and death are chronicled.

⁹ See Claimant Exhibit 5.

¹⁰ See Claimant Exhibit 7.

¹¹ See Claimant Exhibit 5.

¹² See Claimant Exhibit 4.

¹³ See Claimant Exhibit 1.

a. Claimant reported to Collister that he witnessed the shooting and killing of another child: “It was right in front of my face. I was in a car stopped at the stoplight with my mother and brother. I seen him get shot and the guy shooting him. It was a little boy. He was like 13. I seen him shaking on the ground.” (Claimant Exhibit 1.)

b. Claimant additionally described an incident involving the killing of a neighbor to Collister as follows: “I was outside taking out the trash. The stuff was on the news. I was outside when he got shot in the face. I was talking to him and then he walked away and then I heard gun shots and he was dead.” “I heard the shots but I was too scared to see it. It was on the news. It was right in front of my apartment.” (Claimant Exhibit 1.)

c. Several relatives with whom claimant reported close attachments died from illness: his stepmother, maternal great grandmother, and paternal grandfather. Claimant’s cousin was murdered. Claimant told Collister, “Some boys pulled up and jumped out of the car and shot him in the head. His brains were all over the ground.” (Claimant Exhibit 1.)

d. At various points in his evaluation report, Collister addressed the significance of the events set forth above and opined, “[I]t is impossible to overstate the emotionally destabilizing impact of viewing a homicide. It is noteworthy that at about this same time, [Claimant] . . . describes psychotic processing beginning to occur, hearing voices with paranoid tinged aspects, which is not particularly surprising, and is a marker of the reactive emotional destabilization of that to which he was exposed.” (Claimant Exhibit 1.)

e. Collister opined also that “this history is most unfortunate and troubling. . . . I find it rather amazing that with . . . [claimant’s] behavioral difficulties, leading to suspensions and expulsions, and then the active IEP with special education classes, that apparently he was never referred to the LA County Department of Mental Health for an AB 3632 evaluation. . . . AB3632 resources would have provided for well funded psychiatric medication follow[-]up, individual and family therapy, formal behavioral analysis and behavioral programming, or even placement out of the home, indeed, whatever would have been necessary for him from a mental health standpoint to move ahead positively to benefit from his educational exposure.” (Claimant Exhibit 1.)

8. During his competency evaluation of claimant, Collister employed several assessments including the Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV), a measurement of adult and adolescence intellectual functioning defined as a capacity to act purposefully, to think rationally, and to deal effectively with his or her environment;¹⁴ the

¹⁴ Pursuant to Business and Professions Code section 11515, the Administrative Law Judge takes judicial notice of the following:

a. The WAIS-IV generates a Full Scale IQ score that is based on 10 core sub-tests indexed under the broad categories of Verbal IQ and Performance IQ. Verbal IQ is comprised of two sub-indices—Verbal Comprehension Index and Working Memory Index,

Wide Range Achievement Test-Revision 4 (WRAT4), a measurement of reading recognition, spelling and arithmetic computation; the Beery Developmental Test of Visual-Motor Integration (the Beery), a screen for visual-motor deficits, and the Adaptive Behavior Inventory (Short Form), an evaluation of functional daily living skills.

a. Collister reports a Full Scale IQ score of 71, which places claimant's general cognitive ability in the borderline range of intellectual functioning. Collister reports scores of 79 on Perceptual Reasoning, 72 on Verbal Comprehension, 77 on Working Memory, and 74 on Processing Speed for claimant. Collister reports significant subtest scatter on the subtests comprising the Perceptual Reasoning Index. No significant subtest scatter on the subtests comprising the Verbal Comprehension Index was reported.

b. Collister reports that claimant's scores on the WRAT4 were in "the upper end of the mild range of retardation with one of the scores in the middle of the range." (Claimant Exhibit 1.) Claimant's scaled score on word decoding is 62, on word comprehension at the sentence and short paragraph level and on spelling it is 66, and on mathematical computation it is 62.

c. On the Beery, Collister reports results in "the middle of the moderate range of retardation (SS=46), at a 5 year, 6 month equivalent" for claimant. According to Collister, claimant showed "directional confusion as well as perseverative errors."

d. Collister finds claimant's adaptive skill levels, which are in the middle of the mild range of retardation, to be "essentially consistent with levels of academic achievement, intellectual function and with visual-motor integration," reported above in Factual Findings 8b, c, and d.

which include core subtests in vocabulary, similarities, information, arithmetic, and digit span. Performance IQ is comprised of two sub-indices—Perceptual Organization Index and Processing Speed Index, which include core subtests in block design, matrix reasoning, picture completion, digit symbol-coding and symbol search.

b. The WAIS-IV additionally generates an optional score known as the General Ability Index (GAI), which is based on six core sub-tests; the vocabulary, similarities, and information sub-tests comprising the Verbal Comprehension Index and the block design, matrix, and picture completion sub-tests comprising the Perceptual Organization Index. The GAI deemphasizes the Working Memory and Processing Speed indices, the scores on which tend to lower the Full Scale IQ score of an individual exhibiting memory and processing deficiencies. This is not to suggest that the GAI is a proper substitute for a Full Scale IQ score. Working memory and processing speed are critical components of intelligence. Nonetheless, these are components of intelligence that may be impacted by processing and memory deficits requiring accommodation or treatment. In such cases, a valid measurement of intelligence may require foregoing administration of all 10 subtests comprising a Full Scale IQ score.

9. Guided by the Diagnostic and Statistical Manual of Mental Disorders, 4th ed., Text Revised (DSM-IV-TR),¹⁵ Collister reports claimant's Axis I diagnosis as Posttraumatic Stress Disorder, Depressive Disorder—Not Otherwise Specified, and Cannabis abuse. On Axis II, Collister diagnoses claimant with Borderline Intellectual Functioning. Collister reports “rule out”¹⁶ diagnoses for Dysthymic Disorder—chronic (related to fighting), Attention Deficit Hyperactivity Disorder—by history, and Mild Mental Retardation. Collister reports no Axis III, IV, or V diagnoses for claimant. In his psychological evaluation report, Collister summarized his findings and expresses his opinion regarding whether claimant has a developmental disability as follows:

“The current results provide a profile of information regarding cognitive function which raises a distinct possibility of a developmental disorder. The Wechsler Adult Intelligence Scale-IV shows the full scale IQ only one point above the mild range of retardation. The standard error of measurement typically would be about five points in either direction such that this could easily overlap with the mild range of retardation, down to about FSIQ=66. The numerics of the WAIS-IV are not in isolation. Academic achievement is exclusively in the mild range of retardation for reading, writing and mathematics, without any exception. Visual-motor integration drops into the moderate range of retardation by the Beery. Then, social and self-help skills that is identified by the Adaptive Behavior Inventory, Short Form, are in the middle of the mild range of retardation (SS=62). Thus, there is a fabric regarding academic achievement, visual motor integration and adaptive function in the mild range of retardation or below, with the results from the WAIS-IV just slightly higher in the borderline range. The fact that the full scale I.Q. is only one point above the mild range of retardation in the context of the other test results that are all lower, for achievement, adaptive function and visual motor integration would suggest the standard error of measurement might actually be moving the true scores on the WAIS-IV in the direction of the mild range of retardation. That is speculative but a reasonable assertion. (Claimant Exhibit 1.)

10. Collister testified at the hearing consistent with his report.

¹⁵ The Administrative Law Judge takes judicial notice of the DSM-IV-TR, published by the American Psychiatric Association, as a generally accepted tool for diagnosing mental and developmental disorders. The DSM-IV-TR employs a five-axis system of diagnosis with each axis representing the condition of an aspect of a patient's mental health. The five axes are Clinical Disorders (Axis I), Personality Disorders (Axis II), General Medical Condition (Axis III), Psychosocial and Environmental Problems (Axis IV), and Global Assessment of Functioning (GAF) (Axis V).

¹⁶ The Administrative Law Judge take judicial notice that a “rule out” notation is commonly used to denote that a diagnosis should be removed from current consideration.

11. At the direction of Kenyon Juvenile Justice Center Judge Donna Quigley Groman, Kristen C. Ochoa, M.D., a Forensic Psychiatry Fellow at the University of Southern California, examined claimant to determine his competency to stand trial and whether he suffers from a developmental disability. Ochoa's examination of claimant occurred on March 8, 2011 and lasted one hour. Ochoa administered no diagnostic assessment or testing. Ochoa prepared a March 31, 2011 letter to Judge Groman in which she extensively references Collister's psychological evaluation report on claimant set forth above and reports her observations of claimant as follows:

The minor appeared his age, was well-groomed He was pleasant and cooperative with the interview, and responded to all questions. His thought process was appropriate. He was attentive to questions, and was able to sit still for the entire evaluation and did not appear distracted. He appeared able to understand information that was presented to him, especially when restated in simple language. He also seemed able to recall newly learned information on a basic level. His responses were largely terse, but he elaborated with prompting. He did not voice any unusual thoughts or beliefs. (Claimant Exhibit 2.)

12. Ochoa has determined that "[a] conclusive diagnosis of an intellectual or developmental disorder . . . cannot be made[.]" Ochoa's March 31, 2011 letter elaborates as follows:

[Claimant] . . . presents as simplistic and concrete in his thing thinking. This could indicate possible intellectual limitations. He does not appear to be functioning at the cognitive level of a typical 17-year-old. Dr. Collister also reported that the minor's IQ was in the borderline range of intellectual functioning. Additionally, the limited school records provided indicate that the minor is performing far below grade level in his special education classes. The school records and Dr. Collister's assessments are consistent with this examiner's observations that the minor has intellectual limitations. A conclusive diagnosis of an intellectual or developmental disorder, however, cannot be made because of the lack of collateral information. For example, there is evidence that the minor has an IEP, but it is not known if it is based on behavioral problems or a learning disorder. It is also not known if the minor has a recent IEP. Additionally, it is unclear if the minor's non-attendance in school for a full year led to educational deprivation and is influencing his current presentation. All of these potential contributing factors must be taken into account before making a definitive diagnosis.

(Claimant Exhibit 2.)

13. Ochoa did not testify at the hearing. Given that Ochoa conducted no independent assessment or examination of claimant, slight weight is accorded her March 31, 2011 letter.

SCLARC's Evaluation

14. On May 20, 2011, John Amador, MSW, the SCLARC assessment coordinator conducted an intake interview and prepared a psychosocial assessment report for claimant.¹⁷ The assessment coordinator reports claimant's "current functioning" as follows:

Motor Domain: [Claimant] . . . has functional use of his upper and lower extremities. . . .

Self-Help Domain: [Claimant] . . . undresses, dresses and performs all personal hygiene tasks independently. He is toilet trained. He feeds [him]self with is fingers and the appropriate utensils without spillage. He drinks from a cup or glass without spillage. He uses the napkin to wipe self as he eats and drinks. When he was living with his mother, he used to do common chores like throwing the trash, putting away his belonging and cleaning. He would use the stove to cook with direct supervision from his mother. On his own, he made cereal with milk, sandwiches and cup-of-noodle soup. He also used the microwave to warm up cooked or processed food. He is able to move about the nearby community by himself and exhibits safe pedestrian skills. The mother said that she used [to] allow him to go about the community by himself because many family members lived near the family home. Unfortunately, he started leaving the area and spending time with people that got him in trouble. He is not able to ride the bus. The mother drives him to appointments and places outside the neighborhood.

Social Domain: [Claimant] presented as a social and engaging teenager. He reported having many male and female friends. He does not have a best friend at this time. In particular, [claimant] . . . enjoys watching television, listening to music, talking and texting on the phone with friends and playing football. In the community, he enjoys going to movies, parks and movie theatres.

Emotional Domain: The mother reported that [claimant] . . . is a loving and affectionate teenager, who likes to share his belongings. She also said that he does not have any problems with his behavior when he is with her. The problems occur when he is away from her like in school. She also said that he needs to work on ignoring people because he gets upset quickly and has a bad temper. When I asked [claimant] . . . is there something he wanted to change about his live, he said "my anger." He reported being ready to fight anything that made him angry. Fore example, he used to get angry and fight if someone stepped [on] . . . his shoes, someone said some[thing] negative to him or his family members, etc. . . . He is no longer ready to fight over every little

¹⁷ See Service Agency Exhibit 5.

offense. He said his fighting days are in the past. He reported having a close and loving relationship with his parents. . . .

Cognitive Domain: [Claimant] writes his name and personal information. When I asked him to write from dictation *I want to go to the beach in the summer*, he printed “I want to go to the beanch in the summer.” He only misspelled *beach*. He was able to add double digits with carrying and subtract double digits without borrowing. He was able to solve 2x3, 3x5, 5x5. He missed 4x6, 6x7 and 7x8. At this point, I discontinued timetables because it was clear that he did not know them. He knows that a dollar is worth 100 cents. He made change for a dollar using 5, 10, 25 and 50 cents combinations. He was not able to solve \$1-.77. He tells time with digital watch. He identified the following colors and the location of body parts: orange, black, blue, yellow, gray, heart, lungs, ribs, tonsils and intestines.

Communication Domain: [Claimant] expresses his needs and ideas with complete sentences and tells stories with details. His speech is clear and easily understood. In conversation, he is engaging, reciprocates and establishes eye contact without difficulty. Receptively, he follows the meaning of basic conversation and simple, 1- to 2-step commands about activities of daily living.

(Service Agency Exhibit 5.)

15. Amador, who did not testify at the hearing, referred claimant for psychological evaluation, which Gabrielle du Verglas, Ph.D conducted on June 24 2011.

16. du Verglas interviewed and observed claimant and reviewed claimant’s records, including Amador’s report set forth above. du Verglas administered the WAIS-IV, the Wide Range Achievement Test (WRAT-3),¹⁸ the Peabody Picture Vocabulary (Peabody), a test of receptive vocabulary achievement and verbal ability, and the Adaptive Behavior Assessment System-II (ABAS-II), an assessment of adaptive skills, to claimant and reported that claimant “worked with motivation and [that] the obtained test results are viewed as valid indicators of his level of functioning.” (Service Agency Exhibit 4.) Collister’s test results and report set forth above were not available to du Verglas before or during Verglas’ evaluation of claimant. Collister’s report was made available to du Verglas after completion of his (du Verglas’) evaluation of claimant.

a. du Verglas reports a Wechsler GAI score of 77 for claimant, and noted that claimant’s test results show “lower level of abilities in the Verbal Comprehension domain, with abilities at the 1st percentile and Perceptual Reasoning skills at the low average range.”

¹⁸ This version of the Wide Range Achievement Test is outdated.

b. du Verglas reports that on the Peabody, claimant achieved “an age equivalent score of 9-years, 7-month, with a standard score of 68, falling in the 2nd percentile, in the delayed range of abilities. Thus, relative weakness in the verbal domain is present.”

c. du Verglas reports a general adaptive composite (GAC) score of 65, which places claimant in the first percentile rank under the “extremely low” classification. Three domains make up the GAC: the conceptual domain (which includes the skill areas of communication, functional academics, self-direction and health and safety), the social domain (which includes social and leisure skills), and the practical domain (which includes self-care, home living, community use, health and safety, and work skills). du Verglas reports a composite score of 69 for claimant in the conceptual domain, which ranks in the second percentile and is classified as “extremely low.” In the social domain claimant has a composite score of 78 that places him in the seventh percentile and is classified as “borderline.” In the practical domain claimant has a composite score of 75, which places him in the fifth percentile and is classified as “borderline.” (Service Agency Exhibit 4.) du Verglas’ report contains the following elaboration:

COMMUNICATION: He engages in reciprocal conversations with people; waits for the other person to pause before speaking. He can shake his head to ‘yes’ and ‘no’. He can answer questions and listens to information. Typically does not start conversations of interests to others.

COMMUNITY USE: He can order his own meals. He can find a public bathroom independently. He can travel in the community independently. He can ask the store clerk for help and can check out books from the local library.

FUNCTIONAL ACADEMICS: he knows the days of the week. He can write a short note. He cannot read important documents or respond to any business correspondence. He cannot budget his own money.

HOME LIVING: He can operate a microwave and can cook simple foods, such as, a sandwich. He does not plan to cook meals independently. He can sometimes . . . wash his own clothes using the washing machine.

HEALTH AND SAFETY: He takes medications as needed. He understands safety concerns such as using and storing appropriate cleaning supplies.

LEISURE: He can occupy himself independently. He can watch television. He watches sports.

SELF-CARE: He completes all hygiene skills independently. He can shower and regulate the water temperature. He can get ready for school independently. He gets his own haircut.

SELF-DIRECTION: He does not always prioritize appropriately (e.g. completing school work before leisure activities). He can call school when he will be absent or inform family if he is late.

SOCIAL: He can say “please” and “thank you”. He can talk about his feelings. Generally has a good relationship with family members.

WORK: He does not have any work experience thus far.

d. du Verglas notes that claimant’s mother “did not describe any behavioral difficulties at home and reports those to generally occur at school. She described him as being unable to modulate his anger and resulting to fighting rather than using language or walking away to resolve conflict.” du Verglas further notes that claimant “has positive aspirations for his future, such as getting work, getting married and owning his own house.” du Verglas reports that claimant “currently appears to be a more self-motivated to improve his ability to modulate anger.” (Service Agency Exhibit 4.)

17. Employing the DSM-IV-TR, du Verglas diagnoses claimant with Attention-Deficit Disorder (by history) on Axis I and Borderline Intellectual Functioning on Axis II. du Verglas deferred an Axis III diagnosis of claimant’s medical condition. On Axis IV, du Verglas lists claimant’s “past history of juvenile hall placement” as a moderate stressor. On Axis V, du Verglas assigns to claimant a general assessment function (GAF) score of 55,¹⁹ which indicates moderate impairment in social, occupational, or school functioning.

18. du Verglas did not testify at the hearing.

19. R. Miles Uychoco is a licensed psychologist and SCLARC consultant who participated in a service agency core staff team meeting to consider claimant’s eligibility for services. Uychoco testified at the hearing that the core staff team reviewed du Verglas’s report and determined that claimant was ineligible for Lanterman Act supports and services. Uychoco testified that the Wechsler scores reported by du Verglas for claimant did not indicate mental retardation. Uychoco explained that du Verglas reported a Verbal Comprehension IQ score of 74, which is in the borderline range, and a Perceptual Reasoning IQ score of 84, which is in the low average range. Examination of the Matrix Reasoning

¹⁹ The Administrative Law Judge takes judicial notice that a GAF score is a subjective score given on a scale between ten and 100 to indicate general psychological, social, and occupational functioning on a hypothetical continuum of mental health. For example, on one end of the continuum a GAF score of 100 indicates superior functioning in a wide range of activities. There are no symptoms of mental health illness. On the polar opposite end of the continuum a GAF score of 10 indicates persistent danger or harming oneself or others. In the middle of the continuum, a GAF score of 50 indicates serious social, occupational or school functioning.

subtest for Perceptual Reasoning indicates a high range score of 11, which according to Uychoco's testimony, would not be achievable by a person with mental retardation.²⁰

20. Uychoco testified that, based on the test results reported by du Verglas, the core staff team determined that claimant did not exhibit conditions similar to a person with a diagnosis of mental retardation. Uychoco attributed claimant's adaptive behavior or level of functioning to a psycho-social history myriad with early traumatic exposure to violence and death, lack of impulse control that led to fighting, lack of motivation, and possible untreated mental illness. Uychoco testified that claimant reportedly heard voices when he was a 13-year-old.

21. It is established that claimant's general intellectual functioning is in the borderline range of intelligence.

22. It is not established that claimant exhibits significant deficits in adaptive skills or behavior requiring treatment similar to that of a person with a diagnosis of mental retardation.

23. Claimant is not eligible for Lanterman Act services and supports under the "fifth category."

LEGAL CONCLUSIONS

1. A claimant seeking to establish eligibility for government benefits or services has the burden of proving by a preponderance of the evidence that he or she has met the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161[disability benefits]; *Greatoroex v. Board of Admin.* (1979) 91 Cal./App.3d 54, 57 [retirement benefits]; Evid. Code, § 500.)

2. To be eligible for treatment and habilitation services and supports under the Lanterman Act, claimant must establish that he has a qualifying "developmental disability," defined in section 4512, subdivision (a), to mean the following:

. . . a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include mental

²⁰ This assertion disregards that du Verglas also reported other subtest scores of 5 (on Vocabulary, Information, and Block Design) and of 6 (on Similarities and Visual Puzzles). In addition, on cross-examination Uychol admitted that the scores du Verglas obtained for claimant's Verbal Comprehension IQ and Perceptual Reasoning IQ would "probably" have been lower had du Verglas administered all 10 subtests. du Verglas reported a GAI score rather than a Full IQ score, thus indicating that only six subtests were actually administered to claimant. See footnote 10b and Factual Finding 16a.

retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

3. California Code of Regulations (CCR), title 17, section 54000, further defines “developmental disability” as follows:

(a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual . . .

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in need for treatment similar to that required for mental retardation.

4. Establishing the existence of a developmental disability within the meaning of section 4512, subdivision (a), requires a claimant to additionally prove that he has a “substantial disability,” defined in CCR section 54001, subdivision (a), as follows:

(1) A condition which results in a major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

5. A claimant asserting eligibility for Lanterman Act services and supports under the “fifth category” must establish a disabling condition “closely related to mental retardation” or a disabling condition requiring “treatment similar to that required for individuals with mental retardation.” (§ 4512, subd. (a).) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be “closely related” or “similar” to mental retardation, there must be a manifestation of cognitive or adaptive deficits, or both, which render that individual’s disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on I.Q. scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant’s cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with mental retardation. Furthermore, determining whether a claimant’s condition “requires treatment similar to that required for mentally retarded individuals” is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone’s condition requires such treatment.

6. The DSM-IV-TR describes mental retardation as follows:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (e.g., Wechsler Intelligence Scales for Children—Revised, Stanford-Binet, Kaufman Assessment Battery for Children). Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning. . . . When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full-scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading.

Impairments in adaptive functioning, rather than a low IQ are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute.

(DSM-IV-TR at pp. 39 - 42.)

7. Regarding mild mental retardation (I.Q. level of 50-55 to approximately 70), the DSM-IV-TR states:

[Persons with mild Mental Retardation] typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. By their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

(*Id.* at pp.42-43.)

8. Regarding the differential diagnosis of Borderline Intellectual Functioning (IQ level generally 71 to 84), the DSM-IV-TR states:

Borderline Intellectual Functioning describes an IQ range that is higher than that for Mental Retardation (generally 71-84). As discussed earlier, an IQ score may involve a measurement error of approximately 5 points, depending on the testing instrument. Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information.

(*Id.* at p. 48.)

9. Based on the evidence presented, claimant has not met his burden of proof that he has a substantial disability as defined by Welfare and Institutions Code section 4512 and California Code of Regulations, title 17, section 54001. Notwithstanding differing expert measurements of claimant's cognitive function—a FSIQ score of 71 versus a GAI score of 77—there is agreement that claimant presents with Borderline Intellectual Functioning. As set forth above in Legal Conclusions 7 and 8, claimant's FSIQ could be anywhere from 76 (definitely "borderline intelligence") down to 65 (definitely mild mental retardation). But significantly, Collister's "rule out" notation removes a Mental Retardation diagnosis from consideration. Claimant's educational evaluations and record presented at the hearing did not establish any diagnosis of mental retardation. Rather, those evaluations and records indicate that claimant has a specific learning disability and, in part, attributed his cognitive deficiencies to a lack of self-management, which according to Collister is a reaction to significant emotional destabilization claimant experienced beginning at age 13. Collister additionally diagnosed claimant with Post-traumatic Stress Disorder and Depressive Disorder—Not Otherwise Specified. Based on the foregoing, claimant has not met his

burden of establishing that he has mental retardation or a condition closely related to mental retardation.

10. Although claimant's assessment scores for his adaptive functioning skills place him in the "mild range of retardation," according to Collister, and in the "borderline" classification, according to du Verglas, the preponderance of clinical data detailed in Factual Findings 14 and 16c does not establish that claimant presents with significant adaptive functioning deficits requiring treatment similar to that required for individuals with mental retardation. Claimant's academic performance is deficient. Consistent reports of claimant's engagement in and capacity to understand daily conversation, notwithstanding his below age and grade expectation receptive and expressive vocabulary, are contrary to any claim of significant impairment. A failure to meet expectations is not the equivalent of a significant impairment of language skills. Claimant is capable of grooming himself and of caring for his hygiene and toileting needs. Like any typical adolescent, claimant gravitates to processed and microwaveable meals requiring minimal preparation on their part. That is not a deficit associated with mental retardation. Claimant's mobility within his community is limited by parental decree only in instances when the company he keeps leads to trouble. The full extent of claimant's capacity for independent living and economic self-sufficiency was not persuasively established at this time given his status as an un-emancipated minor dependent on the adults around him for his well-being. It is worth noting nonetheless that claimant has stated realistic goals of obtaining gainful employment, and that his IEP has provisions for services to aid his eventual transition from school to the beckoning world of adulthood. Claimant's misplaced priorities and poor choices resulting in school suspensions and expulsions are concerning but they do not rise to the level of a significant deficit in self-direction. Based on the foregoing, claimant has not met his burden of establishing that he has significant adaptive deficits in three or more areas of major life activity including learning, communication, self-care, mobility, capacity for independent living, economic self-sufficiency, and self-direction. Consequently, claimant has not established that he requires treatment similar to that required by an individual who has mental retardation.

11. Claimant has not established by a preponderance of the evidence his eligibility for Lanterman Act services and supports under the "fifth category." (Compare with *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462 [overwhelming evidence established claimant's fifth category eligibility] and *Mason v. Office of Administrative Hearings* (2001) 89 Ca.App.4th 1119 [weight of the evidence did not establish claimant's developmental disability under the fifth category].)

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ORDER

1. Claimant Kyrin M.'s appeal is denied.
2. South Central Los Angeles Regional Center's determination that Kyrin M. is ineligible for services and supports pursuant to the Lanterman Developmental Disability Services Act is affirmed.

Dated: June 28, 2012

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.